

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Rate Adjustment Due to :
Extraordinary or Exceptional : Docket No. R2010-4R
Circumstances :

INITIAL COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) files these Initial Comments pursuant to the Commission's Order No. 757 (July 11, 2011) establishing proceedings on remand¹ in this docket. GCA filed initial and reply comments in the original proceeding in Docket R2010-4.²

GCA's comments in this phase begin with a discussion of the scope of the remand and the issues the Commission will need to decide. We recommend resolutions of these issues, and these in turn point to (i) no revenue increase on the facts of this case, as they appear in light of actual data on the 2008-09 recession, and (ii) independently, an appropriate distribution of any increase which theoretically might be allowed as among classes of mail. In the process, GCA provides (i) an analysis showing the widely disparate effects of the recession on volume trends in some major mail classes, and (ii) an updated and substantially

¹ *United States Postal Service v. Postal Regulatory Commission*, D.C. Cir. No. 10-1343, ___ F.3d ___ (May 24, 2011); opinion amended May 27, 2011.

² Docket R2010-4, Initial Comments of the Greeting Card Association (August 17, 2010), with accompanying Detailed Analysis; Reply Comments of the Greeting Card Association (September 2, 2010).

simplified analysis of the nature of the 2008-2009 recession (the exigent event on which this case turns), parallel to that we submitted in the original proceeding.³

In summary, GCA believes that

1. Since the analysis now feasible shows that the 2008-09 recession was not "exceptional," and hence not an exigency, no rate increase is appropriate under the remand decision;
2. Even if this were not so, analysis of the class-specific effects of the recession demonstrates that the recession had essentially no effect on First-Class Mail volumes and revenues, making consideration of an increase in First Class inappropriate; and
3. The Postal Service's originally proposed increases would, in any event, not be acceptable under the causal-relationship requirement affirmed by the Court of Appeals.

I. SCOPE OF THE REMAND

The Court of Appeals decision in this case leaves the Commission with very wide discretion as to the intermediate and ultimate resolutions it decides to adopt. In essence, the Court ruled that "due to" in 39 U.S.C. § 3622(d)(1)(E) does not unambiguously mean what the Commission took it to mean, but must be interpreted before being applied to an actual exigency request. As the Court

³ See Order No. 547, pp. 48 et seq. for the Commission's summary and discussion. At various points in the present Initial Comments we speak simply of "the recession." This is only for simplicity of reference. GCA still believes that the Commission should analyze the 2008-2009 recession to evaluate whether it is "exceptional" (i.e., an exigent event) in any degree. See Part IV, below.

necessarily recognized⁴, however, the Commission has full authority to interpret this phrase for purposes of administering the exigent-request mechanism; and that is the task with which the Commission has asked participants to assist.⁵

A. Defining the revenue deficiency causally related to the exigency

The issue. Given that there must be a causal relationship between the event(s) recognized as extraordinary or exceptional and the revenue increase requested (a point on which the Court agreed with the Commission, as against the Postal Service's more open-ended reading of § 3622(d)(1)(E)), an important threshold question is the *quantitative* aspect of that causal relation: Does the statute require that the amount of extra revenue to be allowed bear a reasonably close relationship to the amount of financial damage caused by the exigent event(s)? Or does the mere presence of one or more such events justify a revenue request larger than the aggregate financial damage therefrom, and perhaps corresponding instead to the total deficit shown on the Service's books?

GCA believes that the causal relationship between the exigency and the revenue request must be quantitative as well as qualitative – in other words, that the first of the two interpretations suggested above is the right one. In view of the Court's extended discussion of multiple causation, however, some explanation of our recommended reading of "due to" will be helpful.

The significance of multiple causes. The Court of Appeals read Order No. 547 as rejecting the entire requested increase just because it was necessitated by events other than the recession (agreed to be the extraordinary or exceptional circumstance relevant to this case). The Commission did this, in the Court's

⁴ Slip Op., p. 7.

⁵ Order No. 757, ordering paragraphs 3 and 4.

view, because it read "due to" as *unambiguously* requiring this result.⁶ In other words, the Commission's interpretation may indeed be right, but the Commission should have explicitly demonstrated that it was right. Possibly the strongest language the Court used was this (Slip Op., p. 11, as amended):

. . . We also grant the petition in part, rejecting the Commission's *Chevron* step 1 interpretation of "due to" as requiring that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances. Accordingly, we remand to the Commission to address the latter issue at *Chevron* step 2.

It seems clear that the Court believed the remand necessary essentially because the Commission treated "due to" as unambiguous (step 1 of a *Chevron* analysis) when it should have provided a reasoned resolution of the ambiguity the Court saw in that phrase (step 2 of the *Chevron* exercise).

From this viewpoint, it is not hard to see that the Court's extensive discussion of multiple causes does not constitute an instruction, or even an invitation, to the Commission to recognize non-exigent causes as proper grounds for a revenue increase. Rather, it is a demonstration that "due to" is not an unambiguous formula. The terms of the remand permit the Commission to arrive at the same conclusion as before, if analysis convinces it that Congress meant "due to," in this statutory context, to be given the strict reading.

The Court's emphasis on the possibility of multiple causes does, however, raise one question that needs attention. Both the Commission and the Court treated the revenue request as a unit. The Commission rejected the entire request because it found no, or no adequate, causal connection between the recession and the request. The Court, for the most part⁷, treated it in the same

⁶ It characterized the Commission's reading as calling for "a very close match" (Slip Op., p. 9); and see *id.*, p. 11, discussed in the text above.

⁷ The Court did recognize, in its fn. 5, the problem of relative magnitude:

5/ That [i.e., the Court's remarks on multiple causes] said, given the posture of this case, we have no need to decide here whether an increase might be so disproportionate to the

way. But nothing in the statute, or the Court's opinion, requires that the request be treated in this way.

B. Recommended interpretation of the "due to" standard

Scope of a permissible revenue increase. If the Commission, in interpreting "due to," were to conclude that an exigency request reflecting multiple causes, some of them not "extraordinary or exceptional," is not thereby disqualified in toto, it must then decide on the proper relationship between the cause(s) qualifying as exigent and the amount of new revenue appropriately allowed. Should the presence of a qualifying exigency be taken to justify additional revenue sufficient to repair the financial damage from the non-exigent events too? Or should the Commission restrict the additional revenue to that needed to remedy the (demonstrated) financial impact of the exigent event(s) only?

That the Commission is free, under § 3622(d)(1)(E), to parse the causal background of the revenue request into exigency-related and non-exigency-related segments, and restrict relief to the former (if it is found to exist), is suggested by the Court's introductory description of what it was requiring:

. . . We therefore remand to the Commission so that it can exercise its discretion to construe the ambiguous language of section 201, explaining the extent of causation the Commission requires the Postal Service to demonstrate between the exigent circumstance's impact on Postal Service finances and the proposed rate increase.^[8]

exigency's impact on the Postal Service that it could not be considered "due to" that exigency.

The Court, for obvious reasons, did not go on to consider the possibility of scaling down rather than denying a "disproportionate" request, but that is clearly a plausible solution to such a problem.

⁸ Slip Op., p. 3.

The Commission, in other words, is authorized and expected to establish a standard, constituting a "permissible construction"⁹ of the phrase "due to," for quantitative correspondence between the effects of the exigency and the revenue to be allowed.

What should the standard for quantitative correspondence be? GCA believes that, in the event the Commission decides that the existence of some non-exigent background causes does not wholly disqualify a § 3622(d)(1)(E) request, it should require that any additional revenue it allows substantially match the financial impact shown to have resulted from the exigent event(s), and them only.

First, such a standard would be consistent with the Commission's finding, thoroughly justified in Order No. 547, that the exigency provision is "a narrow exception to the general statutory rule that rates for market dominant products are limited by CPI-U-based rate caps."¹⁰ A reading of "due to," and a corresponding decisional standard, which did not distinguish between financial impacts from non-exigent events and those from true exigencies, but instead allowed new revenue to cover both, would scarcely constitute a "narrow exception" to the price-cap principle. In practice, it would amount to a rule permitting the Postal Service to breach the cap to the extent of every financial impact for which it could point to a discrete cause, as long as at least one of those causes was "extraordinary or exceptional."¹¹

⁹ Slip Op., p. 7, quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁰ Order No. 547, p. 54. The Court of Appeals did not disagree; Slip Op., pp. 5, 6.

¹¹ The inappropriateness of such a result becomes clearer when one considers the theory underpinning most regulatory applications of the price-cap principle: that abandoning cost of service as the basis of ratemaking and substituting an extrinsic price or revenue cap will motivate the firm to operate efficiently. If the exception were this broad, however, recovery from ratepayers of costs incurred solely through inefficient management could be sought, as long as there was, at the same time, an extraordinary or exceptional event on whose financial impact the firm could hang its request for above-the-cap relief. Postal ratepayers would, of course, be protected to some degree by the further requirement that the increase be reasonable, equitable, and necessary – the last of these three being particularly relevant, since it incorporates a strengthened "honest, efficient, and economical management" standard. See Order No. 547, pp. 23-24. Our point is

Second, an increase must not only be "due to" exigent circumstances but must also be "reasonable and equitable and necessary" to continued adequate service. The Commission stated in Order No. 547 that "[f]or an adjustment to be 'due to' an extraordinary or exceptional circumstance, the Postal Service must show that the adjustment is a 'reasonable and equitable and necessary' way to respond to the circumstance."¹² GCA might prefer to say that the adjustment cannot be *approved* unless it is reasonable and equitable and necessary, given the exigency and the required causal relationship, rather than making the substantive standard part of the causation requirement. The end result, however, would be the same: a revenue increment¹³ which responds to some event which is *not* an exigency is not allowable under § 3622(d)(1)(E), in part because it is not a reasonable, equitable, or necessary response to exigent circumstances.

Summary. The Commission, under the Court's directive to develop an appropriate interpretation of "due to" in recognition of the ambiguity the Court found, is free within very broad limits to define the causal relationship which must exist between the exigent event and the proposed revenue increments (or total revenue request) before it. This interpretation should not permit recovery of incremental revenue not causally related to the exigency. There should be not just a causal relationship between the exigency and the requested increment, but also a substantial *quantitative* equality between the financial damage resulting from the exigency and the incremental revenue asked for. The Commission should consider itself free to subdivide a request by reference to these relationships to demonstrated exigent events and their demonstrated financial consequences, and to approve parts and reject other parts on that basis.

only that a broad exception not limited to exigency-related recovery would conflict with the central premise of a price-cap system.

¹² *Id.*, pp. 55-56.

¹³ Throughout these Comments we use "increment" to refer to a portion of an exigency request which is separable from the whole by reference to the event – exigent or non-exigent, as the case may be – to which it is causally related.

So far we have discussed, essentially, the "due to" requirement, with occasional reference to the other branch of § 3622(d)(1)(E) – the "reasonable, equitable, and necessary" standard. This standard has at least equal importance in the administration of the exigency provision, and we turn next to it.

II. THE REQUIREMENT THAT AN EXIGENCY INCREASE BE REASONABLE, EQUITABLE, AND NECESSARY

A revenue increment the need for which has been shown to be caused by an exigent event does not, without more, qualify for Commission approval under § 3622(d)(1)(E). The rate changes to produce the incremental revenue must also be "reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States." As the Commission has suggested, this standard and the causation requirement are to a degree interdependent.¹⁴ Nevertheless, the "reasonable, equitable, and necessary" standard has an independent force not shared with the causation requirement.

When is a revenue increment not "reasonable"? At a fairly abstract level, it is not hard to see that even if a financial loss can be convincingly linked with an exigent event, a rate increase may not be a *reasonable* way to repair it. Assume, for example, that a (genuine) exigency emerged, in the form of an unprecedented ("extraordinary") decline in volume for the product in question. The causation requirement may be deemed satisfied, but it does not follow from this that the financial damage flowing from the volume loss can be remedied by increasing rates for the affected product. If, for example, the volume decline is due to the unexpected emergence, on a very large scale, of a cheaper but equally good substitute for the product, raising the product's price will simply accelerate purchasers' migration to the new substitute. The result will be *less* revenue, and the

¹⁴ See the discussion on p. 6, above.

firm's financial predicament will be aggravated. In this situation, a price increase is not a "reasonable" measure. (Cost reduction, product improvement, or re-thinking of pricing policies might be more promising alternatives.)

Similarly, in the case just outlined, a price increase would not be a *necessary* step, if "necessary" is defined – as § 3622(d)(1)(E) does define it – as "necessary in order to maintain the firm's ability to render adequate service."¹⁵ A measure which is likely to make adequate service harder to provide, by reducing the firm's total revenue intake, can hardly be deemed "necessary" by this standard.¹⁶

The overlap between the causation requirement and the "reasonable, equitable, and necessary" standard. In the hypothetical case, we assumed that the volume loss leading to the financial distress was indeed caused by an exigent event. But this will not always be the case; nor, significantly, will it be the case for all Postal Service classes and products even if it is for some. If it is not, then a particular proposed revenue increment may fail *both* the causation and "reasonable, equitable, and necessary" tests.

This is particularly true where, as here, all concerned acknowledge that the Postal Service's financial problems have multiple causes. The Postal Service has stated that the problems are caused by "lack of operating flexibility" and three other factors: diversion of mail to electronic alternatives, the recent recession, and the stringent retiree health benefits prefunding schedule imposed by the Postal Accountability and Enhancement Act of 2006 (PAEA).¹⁷ Logically, it is possible that some products may be affected (only) by factors properly viewed as

¹⁵ In contradistinction, for example, to treating "necessary" as referring solely to improving the (very) short-term impression conveyed by the firm's financial statistics.

¹⁶ We should distinguish here between revenue, considered *in abstracto*, and a revenue increase. Obviously, for a firm in financial difficulties, additional revenue is likely to be "necessary." The question under § 2622(d)(1)(E), however, is whether the *rate increase* (supposed, but not guaranteed, to imply a revenue increase) is necessary; and if it is likely to result in the firm's losing rather than gaining revenue, it clearly is not "necessary."

¹⁷ See Order No. 547, p. 34 (citing Postal Service witness Corbett).

exigent while others are affected (only) by non-exigencies. This is especially likely when the various factors contributing to the firm's economic hardship are of different economic types. If, as here, it is established that the 2008-2009 recession constitutes a genuine exigency while diversion of some types of mail to the Internet does not, the Commission must be alert to possible *interclass* differences in the importance, or even the existence, of economic effects stemming from the truly exigent factor. This is true not just because an increase aimed at compensating for a volume loss not caused by an exigent event would violate the causation requirement, but also because it could well contravene the "reasonable, equitable, and necessary" standard.

All of the foregoing is concerned with the proper general standards to apply when the asserted premise for an exigency increase does turn out to be, at least to some extent, "extraordinary or exceptional." As noted earlier, GCA believes that in this case that is not so, and that no increase is warranted. We turn next to the situation actually before the Commission. In the next section of these comments, we analyze the situation in these terms with particular reference to First-Class Mail; and in the section following we summarize our analysis of the 2008-09 recession.

III. COMPARATIVE ANALYSIS OF THE MAIL VOLUME EFFECTS OF THE 2008-2009 RECESSION

Introduction. This section, and part IV, should be read in connection with the Detailed Analysis, where the derivation of the result we present in summary form here is fully explained. There is a close relation between the topic we discuss in this part III – the disparity in the effects of the recession on different mail classes – and the subject of part IV, which is the appropriate way of investigating possible division of the 2008-09 recession into "exigent" and "non-exigent" components and our conclusion that, as a whole, it was not an "exceptional" event. This is true not least because some of the newly available economic data, which we explain in the Detailed Analysis, pertains to both issues. At this point, how-

ever, we ask the reader to recall, again, that while we refer to "the recession" for simplicity, we also advocate analysis of any recession claimed as an exigency into a fraction that can properly be called "exceptional" and a fraction that cannot. Any revenue increments the Commission approves on the basis of recession-induced losses should be scaled to the "exceptional" portion only. For discussion, see part IV, below.

In this section, the principal issue is the sharp disparity between the effects of the recession on First-Class Mail and its effects on other major mail categories. It is well known that First-Class Mail is experiencing major volume losses by reason of diversion – especially of transactional mail – to the Internet. Internet diversion, it is agreed, is not an exigency but a relatively long-run historical trend.

As a consequence, volume and revenue losses due to Internet diversion are not the result of extraordinary or exceptional circumstances, and do not constitute grounds for a revenue increase. This is so, first, simply because they are not “due to” the exigency underlying this case – the 2008-09 recession. The causal relationship demanded by the Commission, with judicial approval, is simply not there. Furthermore, as we discuss below, such an increase in the case of First Class would be counterproductive, in terms of restoring the Postal Service’s financial stability, and thus neither reasonable nor necessary within the meaning of § 2622(d)(1)(E).

Analysis demonstrating that the recession did not materially affect First-Class volume. The econometric work described in the Detailed Analysis shows that the 2008-09 recession had hardly any independent effect on First-Class Mail volumes. We can demonstrate this now, as we could not in the earlier phase of the case, because two years of post-recession data are available. To oversimplify somewhat for purposes of summary: we performed sets of regression analyses using Postal Service volume data, first excluding the six quarters of the reces-

sion and next including them. The smaller the difference in the equations for "without recession" and "with recession" data, the less the influence of the recession on volume. The analyses here produced practically identical equations, indicating that the recession had no significant effect on First-Class Mail volume.

We showed above (pp. 8 et seq. – but the entire discussion starting on p. 4 is relevant) that if even a genuine exigency has not caused the financial problems in a particular class of mail, increasing rates for that class is not a reasonable or necessary solution and therefore is not countenanced by § 3622(d)(1)(E). The consequence here is that the Commission, if it decides to allow any revenue increase in this case, should look elsewhere than in First Class.

It might be argued, in response, that the object of the exigency mechanism is to restore the financial stability of the Postal Service *as a whole*, and that the Commission should therefore not focus on individual classes but simply on obtaining the largest practicable overall revenue enhancement. This objection, however, would not dispose of the problem. We have shown that First-Class Mail volume and revenue did not significantly decline as a result of the recession. But they have declined, as is well known; and (as is equally well known) the main cause of the decline has been the migration of hard-copy mail to the Internet. The marginal cost to the user¹⁸ of paying a bill on-line is negligible compared to that of paying the same bill by mail. The result of increasing the latter cost is likely to be a further decline in First-Class Mail volume and revenue – a result exactly the opposite of the one the Postal Service hopes to obtain.

¹⁸ We recognize, of course, that there are capital costs involved in enabling oneself to conduct business on-line, and that the prospective user must also learn some occasionally complex new techniques. On the other hand, the investment in time and money provides returns besides the ability to conduct transactions otherwise handled by mail, and (to take, as an example, the significant media change in the movie rental business) the scope and variety of such potential benefits is growing. In any case, the cost comparison, for mail volume estimation purposes, depends heavily on marginal costs.

IV. THE 2008-2009 RECESSION DOES NOT QUALIFY AS AN EXIGENCY

In the first phase of this proceeding, GCA presented a detailed demonstration that it was both necessary and possible to divide the 2008-09 recession into "exigent" and "non-exigent" components.¹⁹ The Commission, having concluded that the requested revenue increase lacked a causal nexus with (any part of) the recession, did not need to decide whether GCA's proposal should be adopted. It did state that the concept "of decomposing an extraordinary or exceptional event into a normal portion and an exigent portion and using that analysis to estimate a range of acceptable exigent rate increases would appear to have merit."²⁰ GCA, likewise, believes that it does, and should be undertaken here. On the other hand, the Commission's further comment – that GCA's presentation showed how difficult it could be to divide a "complex economic event" into "normal" and "ab-normal" portions – is, for reasons we explain next, no longer apposite.

The discussion in the Detailed Analysis accompanying these comments shows that, in fact, the 2008-09 recession did not qualify at all as an exigent event. In retrospect, using what GCA believes are the appropriate comparators, it was no more than an "average" recession and was not "exceptional" in the sense required by § 3622(d)(1)(E). See, especially, Detailed Analysis at pp. 4-8.

A. Dating the recession

One problem GCA faced in its original analysis has now been resolved: choosing an ending date for the 2008-09 recession. During the first phase of this case, the National Bureau of Economic Research (NBER) had not yet dated the trough of the recession. Thus we had to draw inferences from three plausible dates: June 2009, October 2009, and December 2009. NBER has since dated

¹⁹ See especially the Detailed Analysis filed on August 17, 2010.

²⁰ Order No. 547, p. 51. The Commission discusses GCA's method at pp. 48-49 and 50-51.

the end of the recession as June 2009.²¹ Thus the recession is a six-quarter (18 month) event. It is no longer necessary to complicate the analysis by making three sets of estimates using varying durations for the recession as a whole.

B. Choosing the basis of comparison

The fixing of an end date for the 2008-09 recession also helps dispose of another major problem. To compare a particular recession with others in order to decompose it into "exceptional" and "ordinary" (non-exceptional) portions, one must choose a set of comparators. For example, should the 2008-09 recession be treated as just one of a series of post-World War II recessions, when automatic Keynesian stabilization policies made recessions less severe? Or should it be compared also with "pre-Keynesian" recessions (i.e., those occurring in a more free-market or *laissez faire* policy context) – which tended to be more severe? Adopting the first alternative would make the "extraordinary" part of the 2008-09 downturn appear larger, since that recession would be compared with a set of other recessions which were relatively mild in comparison to a set which included the pre-Keynesian history as well.

Help with this problem is provided not just by the definition of the 2008-09 recession as an 18-month event, but also by the two years of recovery data now available. These data include information on Internet diversion of mail, which we discussed in part III, above. They also show, however, that the current recovery is far from strong. The growth rate of GDP since the recession has been weak, despite the application of a massive fiscal policy stimulus and injection of money into the economy by the Fed, along with maintenance of very low interest rates on the instruments it can affect. As a result, unemployment remains stubbornly high, and the lack of extra tax revenue associated with a normal recovery has continued to cause crippling budget deficits at the Federal and State levels. The

²¹ NBER published its result only a matter of days before the Commission issued Order No. 547; its announcement is found at <http://www.nber.org/cycles/sept2010.html>.

economic outlook in its entirety remains so uncertain on both policy and real economic activity fronts that, while businesses are earning healthy profits again, they are, with only some exceptions, hoarding enormous amounts of cash rather than making real investments. All these factors taken together are indications that the current economic cycle, no less than the 18-month recession, bear little if any resemblance to any other post-war recession.

It is also noteworthy that, at 18 months, the 2008-09 recession was longer than any of the ten postwar recessions and equal to five of the 11 prewar ones. From that standpoint, the longer series of comparators is more appropriate. In decomposing the 2008-09 recession into exigent and non-exigent elements, using a set of comparators all of which were shorter than the 2008-09 event would introduce an obvious bias into the result.

Consequently, GCA believes that the proper comparison is the one we offered in the first phase of this docket, which includes "pre-Keynesian" recessions as well as those of more recent date. The consequence, as noted above and explained in the Detailed Analysis, is that no exigency increase is warranted.

V. DISTRIBUTION OF REVENUE INCREMENTS AMONG CLASSES

A. What makes an increase "equitable" under § 3622(d)(1)(E)?

The discussion above has shown that, from the standpoint of the causation requirement, the equally important mandates that any increase be "reasonable" and "necessary," and the definitive analysis of the 2008-09 recession which more recent data have made feasible, no increase in rates can be justified. Stepping back momentarily from that conclusion, however, it remains true that we have not, so far, focused on the parallel requirement that any increase be "equitable." We next need, therefore, to inquire what "equitable" means – or does not mean – in the exigency-case context. The discussion that follows con-

siders a hypothetical increase, ignoring, *arguendo*, the fact that the nature of the recession in issue here does not justify any rate adjustment.

One appropriate inference is that by including "equitable" as a standard, Congress signaled an intention that the Commission consider individually the revenue increments proposed for each mail class or category. If only the total financial damage from the exigent event and the total revenue increase requested had to be considered – with no attention paid to the individual increments – it would seem that "reasonable" and "necessary" would have sufficed. Inclusion of the concept of equity naturally suggests that the relationship between individual increments, and between various classes and the possibly disparate financial effects of the exigency, should be factors in the Commission's decisionmaking. We showed in part III, above, how such consideration leads to the conclusion that seeking a material revenue increment from First Class would be inappropriate in this case.

Limitations on the role of "equitable" in the exigency context. Since the Court of Appeals has now largely vindicated the Commission's view that a causal relationship must exist between the exigent event(s) and any revenue increments approved, the role of purely equitable considerations seems to be limited in somewhat the same way that it would have been under the cost-attribution mechanisms of the 1970 Postal Reorganization Act.²² Cost attribution in that context was (as it still is) an empirical process, focused on the discovery and quantification of objectively existing causal links between cost elements and – under the 1970 statute – subclasses of mail. Considerations like "As a matter of fairness, class X should pay more" had, and have, their place in rate-setting, but that place is not in the cost attribution phase.

²² And under PAEA as well, though the role of attribution is perhaps less central than under the earlier Act.

Like former 39 U.S.C. § 3622(b)(3) and its PAEA counterpart, 39 U.S.C. § 3622(d)(1)(E) as implemented by the Commission rests on a requirement of causation. Evaluation of a proposed exigency increase, accordingly, cannot start with, or consist wholly of, judgments as to the equity of the proposed increases. Of course there may be situations where the cost to be recovered cannot be associated with any particular mail category. For example, Docket R2005-1, decided under the 1970 Act, involved a Congressional imposition – the escrow payment required by Pub. L. 108-18 – which bore no relation to any Postal Service expenditure for labor, supplies, machines, or other resources for moving the mail. The Postal Service proposed, and most of the parties and the Commission agreed, that an across-the-board increase was the appropriate way to fund this exogenous cost.

The present case is not at all like R2005-1. The exigency on which the proposal necessarily rests is the 2008-09 recession (or, more precisely, the "exceptional" part of that event). This, as we showed above, affected the volumes and revenues of different classes in widely disparate ways. Equitable considerations, however valid, cannot change those facts.

B. The Postal Service's original profile of proposed increases can no longer be justified

The discussion above could have considerable practical importance, because the detailed rate change proposal before the Commission is still, presumably, the one the Postal Service filed in July of 2010. As its original Request made clear, the increases it proposed were, for major classes, roughly equal (except for underwater categories, which were raised more). The proposed percentage increases²³ were:

First Class	5.417 percent
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²³ See Exigent Request of the United States Postal Service (July 6, 2010), p. 15, Table 3.

Standard	5.616
Periodicals	8.035
Package Services	6.700
Special Services	5.225

These relationships were at least heavily influenced, if not determined, by considerations of equity. For instance, in explaining the proposed Standard Mail rates, Mr. Kiefer observed that

. . . This is in line with the level of increases being requested for First-Class Mail and does not place an undue burden for resolving the Postal Service's financial difficulties either on Standard Mail or on First-Class Mail.^[24]

Similarly, at p. 68 of his Statement, Mr. Kiefer stated that the entire rate development process underlying the proposal "result[ed] in an equitable sharing of the burden of this above-CPI exigent price request."

The Postal Service's heavy reliance on the principle that "equality is equity" was, given its assumptions, not at all unreasonable. As the Court of Appeals pointed out, the Service took the view that there need not be any causal relationship between the exigent event put forward as the basis for the request and the amount of the request (or, presumably, any separable component of it).²⁵ Its position was, in effect, that the exigent event was needed to trigger the process but thereafter need not influence the rate changes actually requested. Since the Court has now rejected that open-ended view of § 3622(d)(1)(E), equitable considerations can no longer play so extensive a role as Mr. Kiefer indicates they did in the original construction of the rate request.

In summary, therefore, the profile of rate changes initially proposed in this docket no longer responds to the requirements of § 3622(d)(1)(E) as explained

²⁴ Statement of James M. Kiefer, p. 29.

²⁵ Slip Op., pp. 8-9.

by the Court. A pattern of rate changes responsive (as the original submission is not) to the disparate causal relationships between the recession and the behavior of volumes and revenues, class by class, would be required, were any increase at all to be found appropriate.

VI. SUMMARY AND CONCLUSIONS

A. It is now possible to analyze definitively the nature of the claimed exigency – the 2008-09 recession – and this analysis shows that the recession did not qualify as "exceptional." Hence no rate adjustment can be based on it, since, as now confirmed by the Court of Appeals decision, there must be a causal relationship between the "extraordinary or exceptional" circumstances and the rate change.

B. Even if this were not so, it would still be improper to seek additional revenue from First-Class Mail. Analysis, class by class, of volume behavior before, during, and after the recession, indicates that the economic downturn had essentially no effect on First-Class volumes. The substantial decline in First-Class mail is due predominantly to Internet diversion, which is not an exigent event but a long-run historical process.

C. The Postal Service's original profile of rate changes, technically still before the Commission, could not be approved even if the recession did qualify as a § 3622(d)(1)(E) exigency. While it may have been designed with equitable considerations in mind, the implied interpretation of the statutory term "equitable" cannot override the causal relationship requirement affirmed by the Court.

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Respectfully submitted,

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